# Asas Dunia v Tan Chee Seng & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22-32 OF 1996
MOHD HISHAMUDIN J
20 JULY 1998

***Civil Procedure*** *— Want of prosecution — Delay — Delay by plaintiff in filing summons for directions — Plaintiff awaiting outcome of another appeal relating to same land — Parties negotiating settlement — Whether delay was intentional and contumelious — Whether parties had earnest desire to reach amicable settlement*

The plaintiff filed the writ and statement of claim against the defendant in March 1996. The defendant filed his statement of defence in October 1996. Thereafter, the parties took no further action. In June 1998, the court issued a notice to show cause pursuant to O 34 r 8(2) of the Rules of the High Court 1980. Upon receipt of the notice to show cause, the plaintiff filed the summons for directions in July 1998. The plaintiff contended that the delay was due to two reasons, ie that: (i) the plaintiff was awaiting the outcome of an appeal pending before the Court of Appeal which related to the same land as in the instant case; and (ii) the parties were negotiating for an amicable settlement.

**Held**, dismissing the action for want of prosecution:

(1) The plaintiff did not take further steps in the proceedings since October 1996. There was no merit in the plaintiff's contention that the delay was caused by the pending appeal before the Court of Appeal. Although the appeal related to the same land, it concerned an application for removal of a caveat. Hence, it was not a valid ground for not proceeding with the present suit. In any event, no application for a stay of proceeding had ever been filed by any party. The delay was intentional and contumelious and therefore, the plaintiff's action was liable to be dismissed for want of prosecution (see pp 463H–I and 464A–B); *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 followed.

(2) The brief negotiation between the parties which turned out to be inconclusive took place in December 1996 to January 1997, but there was no evidence of any effort to effect an amicable settlement after that. Mere efforts to effect a settlement by themselves do not afford a valid answer. In the present case, although there were efforts to settle, there was no earnest desire on the part of both parties to reach an amicable settlement (see p 464B–C, E, I); *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 distinguished.

**[Bahasa Malaysia summary**

Plaintif memfailkan writ dan pernyataan tuntutan terhadap defendan pada bulan Mac 1996. Defendan memfailkan pernyataan pembelaan pada bulan Oktober 1996. Selepas itu, pihak-pihak tidak mengambil

tindakan lanjut. Pada bulan Jun 1998, mahkamah mengeluarkan satu notis tunjuk sebab menurut A 34 k 8(2) Kaedah-Kaedah Mahkamah Tinggi 1980. Atas penerimaan notis tunjuk sebab, plaintif memfailkan saman untuk arahan pada bulan Julai 1998. Plaintif menghujahkan bahawa kelewatan adalah disebabkan dua alasan, iaitu bahawa: (i) plaintif sedang menunggu keputusan rayuan di Mahkamah Rayuan yang berkaitan dengan tanah yang sama seperti dalam kes ini; dan (ii) pihak-pihak sedang berunding untuk penyelesaian yang ramah.

**Diputuskan,** menolak tindakan kerana ketiadaan pendakwaan:

(1) Plaintif tidak mengambil langkah lanjut dalam prosiding sejak Oktober 1996. Tiada merit dalam penghujahan plaintif bahawa kelewatan disebabkan oleh rayuan yang menunggu penyelesaian di hadapan Mahkamah Rayuan. Walaupun rayuan berkaitan dengan tanah yang sama, ia kena-mengena dengan suatu permohonan untuk pembatalan kaveat. Justeru itu, ia bukanlah alasan yang sah untuk tidak meneruskan guaman ini. Bagaimanapun, tiada permohonan untuk penggantungan prosiding pernah difailkan oleh mana-mana pihak. Kelewatan adalah disengajakan dan 'contumelious' dan dengan itu, tindakan plaintif haruslah dibatalkan kerana ketiadaaan pendakwaan (lihat ms 463H–I dan 464A–B); *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 diikut.

(2) Perundingan ringkas di antara pihak-pihak yang ternyata tidak muktamad berlaku pada Disember 1996 sehingga Januari 1997, tetapi tidak terdapat apa-apa keterangan atas sebarang usaha untuk melaksanakan penyelesaian yang ramah selepas itu. Usaha semata-mata untuk melaksanakan penyelesaian oleh diri mereka sendiri tidak memberikan sebarang jawapan. Dalam kes ini, meskipun terdapat usaha untuk menyelesai, tidak terdapat sebarang keinginan yang bersungguh-sungguh oleh kedua-dua pihak untuk mencapai penyelesaian yang ramah (lihat ms 464B–C, E, I); *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 dibeza.]

## Notes

For cases on delay, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4974–4978.

## Cases referred to

*Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 (folld)
*United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 (distd)

A **Legislation referred to**

Rules of the High Court 1980 O 25 r 1(1), (4), O 34 r 8(2)

*Foo Say Keow* (*Murad & Foo*) for the plaintiff.
*Abdul Rahim bin Mohd* (*Johari Ahmad & Tan*) for the first and second defendants.

B

**Mohd Hishamudin J**: A notice to show cause (encl 13) was issued by the deputy registrar of the High Court to the parties in June 1998. It was issued pursuant to O 34 r 8(2) of the Rules of the High Court 1980.

The hearing for the show cause was heard before me on 20 July 1998.

C After hearing both parties, I ordered that the action be dismissed for want of prosecution.

I shall now give my reasons.

The writ and statement of claim was filed on 24 March 1996 (encl 1).

D The last step taken by the parties, prior to the issuance of the notice to show cause, was the filing by the first defendant of his statement of defence on 19 October 1996. Thereafter, either party took no further action. (Only after receipt of the notice to show cause did the plaintiff, on 7 July 1998, file the summons for directions vide encl 15.)

E The principle applied by this court was as laid down by the Federal Court in *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152, that is (at p 153):

> ... we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus — that the plaintiff's action is liable to be dismissed for want of prosecution when the court is
F satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it.

The philosophy behind O 34 r 8(2) was eloquently explained by Salleh Abas FJ (as he then was) in that case (at p 153) and needs no repetition
G here.

At the end of the hearing, I was satisfied that the delay was intentional and contumelious (ie disrespectful to the court).

First, since October 1996, the plaintiff did not take further steps in the proceedings. This is a very long delay. According to O 25 r 1(1) of the
H Rules of the High Court 1980, the summons for directions must be filed within one month after the pleadings are deemed to be closed. And according to O 25 r 1(4), if a plaintiff fails to file the summons for directions, the defendant may file for an order to dismiss the action.

It is clear that the delay was intentional and contumelious. For,
I according to learned counsel for the plaintiff, the delay was because the plaintiff was awaiting the outcome of an appeal in another case, ie Originating Motion No 25–33–1995 — an appeal pending before the Court of Appeal in respect of which no date of hearing has yet been fixed.

This reasoning has no merit. It is true that the said originating motion relates to the same land as in the instant case, but it concerns an application (by the first and second defendants in the present suit) for the removal of a caveat. Hence, legally, it is not a valid ground for not proceeding with the present suit. Moreover, in any event, no application for a stay of proceeding has ever been filed by any party.

The other reason given for the delay was that the parties were negotiating for an amicable settlement. This ground is also devoid of any merit. The brief negotiations — which, in any event, turned out to be inconclusive — took place way back in December 1996 to January 1997, but there was no evidence of any effort to effect an amicable settlement after that. Of course, I am mindful of *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73. But in that case, the facts were materially different. There, before the defendant filed the application to dismiss the plaintiff's claim for want of prosecution, the plaintiff had already taken out a summons for directions, filed an affidavit verifying a list of documents and filed the request for setting down the action for trial. Moreover, the Supreme Court, in coming to its decision, had ruled inter alia (at p 81):

> On a whole, we are of the view that the delay in the present case was due to the *earnest desire* of both parties to reach an amicable settlement which did not succeed. (Emphasis added.)

In the present case, however, although there were some efforts to settle, yet there was no earnest desire on the part of both parties to reach an amicable settlement.

However, be that as it may, *Palm and Vegetable Oils* has frequently been quoted by lawyers when faced with a notice to show cause. It is my observation as a judge that, with respect, litigants have quite often misunderstood the decision of that case as affording a convenient answer when faced with such a notice. With this problem in mind, I therefore would like to take the opportunity here to rule that, as a matter of principle, in order for a court to accept the parties' attempts to effect an amicable settlement as an explanation for delay, there must be clear and credible evidence showing:

(a) that taking into account the circumstances of each individual case, prompt actions were taken by the parties to effect an amicable settlement;

(b) that the parties were earnest, that is to say, the steps taken by them were serious and unequivocal; and

(c) that the period of negotiations was not indefinite in nature or was not, under the circumstances, unreasonably too long.

In other words, mere efforts to effect a settlement by themselves do not afford a valid answer. The steps taken by the parties must satisfy the criteria that I have just prescribed.

*Action dismissed for want of prosecution.*

Reported by Jafisah Jaafar